the unsatisfactory ground that a subsequent creditor by failing to take an express collateral charge is presumed to consent to the debtor's dealing with the property as singly encumbered.[14]

Newby v. *Fox* (Kan. 1913) 133 Pac. 890, presented a very interesting situation for the application of the principle of marshaling. N, having executed a mortgage upon his farm, sold it to M, who assumed payment of the mortgage and gave N a second mortgage on a part of the farm. The rest of the land, after several transfers subject to both mortgages, came into the hands of B, subject to only 36 per cent. of the first mortgage. Upon foreclosure of both mortgages N claimed the right to compel the holder of the first mortgage to satisfy as much of his claim as possible out of the fund derived from the sale of the land owned by B before resorting to the part by which the two mortgages were secured. The court upheld N's contention despite the fact that he was personally liable to the first mortgagee,[15] and notwithstanding B's position as purchaser subject to but 36 per cent. of the first encumbrance. This decision is the logical result of treating the right to marshal as an equity, but it cannot be justified if that right is considered as a mere device of equity for determining the order and method of satisfaction of several overlapping claims. Since the rule is invoked purely in the interest of justice, the view of marshaling which will secure the fairest distribution of the debtor's property should be adopted.[16] And rather than to place the entire burden of the first mortgage upon the singly encumbered tract it would be more equitable to compel the respective parcels to contribute each its ratable share.[17]

VESTED RIGHTS AND STARE DECISIS.—When the highest court of a State has several times decided that a plaintiff under a given state of facts has a cause of action does a subsequent decision in a case upon "all fours" with the previous cases, that the plaintiff has no cause of action, deprive the latter of a right, and if so, can he under the Federal Constitution secure a revision of the state decision by the Supreme Court?[1] This question is suggested by the recent case of *Oliver Co.* v. *Louisville Realty Co.* (Ky. 1913) 161 S. W. 570. For almost fifteen years the Kentucky Court of Appeals had consistently held that the statute making it unlawful for corporations to do business in the State without filing certain certificates with the Secretary of State did not avoid contracts made by corporations which had not complied with the law, but merely imposed a penalty for the non-observance of the statute.

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[14]Adams, Equity (8th ed.) 271, 273.

[15]The court in the principal case distinguished Dolphin *v.* Alyward, *supra*, on the ground that the land was primarily liable for the satisfaction of the first mortgage. See note 6, *supra*.

[16]18 Harvard Law Rev. 453.

[17]1 Story, Eq. Juris. (13th ed.) § 634a.

[1]It is well settled that when a case is brought into the federal courts because of diversity of citizenship those courts may refuse to follow a decision of the state court either because it overrules prior decisions upon which the parties to the suit have acted, see Rowan *et al. v.* Runnels (1847) 5 How. 134; Gelpcke *v.* Dubuque (1863) 1 Wall. 175; Great Southern Hotel Co. *v.* Jones (1904) 193 U. S. 532, or because, in the opinion of the federal courts, the state decision is unsound. See Burgess *v.* Seligman (1882) 107 U. S. 20.

After these cases the plaintiff, without complying with the statute, made the contract upon which this suit was brought. The court decided, two judges dissenting, that the former decisions were erroneous; that this contract was void; and that no constitutional right of the plaintiff was violated by such a reversal in the construction of the law.

Whatever the theory may be, it would seem that if at the time a particular transaction occurs the law is well settled that certain legal consequences flow therefrom, a subsequent decision, such as that in the principal case, holding that no such legal consequences do ensue, really takes away those rights which in previous decisions were held to vest in the parties to the transaction. That the Supreme Court recognizes this fact would appear from its decision in the case of *Muhlker* v. *Harlem River R. R.*,[2] where a state court, in holding a statute constitutional which was assailed both as a violation of the "impairment of contract clause" and of the Fourteenth Amendment, placed its decision on the ground that the complaining party had no such right as that alleged to be impaired by the statute, although previous decisions had recognized such a right. The Supreme Court, nevertheless, held the act unconstitutional, since it did deprive the complaining party of the right in spite of the assertion of the state court that the plaintiff had no such right. Likewise, where a right claimed under a state statute is alleged to have been impaired by a subsequent statute, if the state court in previous decisions has held the first act constitutional, its subsequent declaration that it was unconstitutional, and that, therefore, no right of the plaintiff has been impaired, will not prevent a reviewal of this question by the Supreme Court.[3] For in as much as the state constitution did at one time permit the legislative action which the subsequent decision held it no longer allowed, the plaintiff did acquire rights under the first act which the subsequent act impaired.

But the decisions of the Supreme Court in these two classes of cases in which the rights of the parties are impaired by legislative action, would not authorize a reviewal of the decision in the principal case, since no subsequent legislative act was there involved. And in as much as that Article I, §10 does not prevent the impairment of the obligation of contracts, by judicial decisions,[4] the plaintiff would have to rely entirely upon the Fourteenth Amendment. While it cannot be doubted that an act of the legislature which had any such effect upon existing contracts as the decision of the Kentucky court would be violative of the Fourteenth Amendment, the question whether a plaintiff under such circumstances is entitled to have his case re-

[2](1905) 197 U. S. 544; *cf.* Sauer *v.* New York (1907) 206 U. S. 536. The statute under review in the Muhlker case apparently sought to license the interference without compensation by the Railroad Co. with rights which previous decisions had held to vest in abutting owners. It was, therefore, properly held to deprive the abutting owners of their property without due process of law. But see 2 Willoughby, Constitution, § 514, *et seq.*

[3]State Bank of Ohio *v.* Knoop (1853) 16 How. 369; Ohio Life Ins. & Trust Co. *v.* Debolt (1853) 16 How. 416; McCullough *v.* Virginia (1898) 172 U. S. 102; Louisiana *v.* Pilsbury (1881) 105 U. S. 278, 294; *cf.* Fisher *v.* City of New Orleans (1910) 218 U. S. 438.

[4]Railroad *v.* McClure (1870) 10 Wall. 511. The Supreme Court will not review by writ of error state decisions impairing the obligation of contracts unless they give effect to some legislation impairing contracts. See 3 Columbia Law Rev. 272; but see 4 Illinois Law Rev. 155, 330.

viewed by the Supreme Court must depend upon whether the Fourteenth Amendment, properly construed, equally protects against the divesting of rights by judicial decisions. And although it has been ably contended[5] that under the Fourteenth Amendment the Supreme Court has jurisdiction to review a decision of the highest state court which, independently of any statute, decides that a plaintiff no longer has a right which previous decisions have recognized, the Supreme Court has thus far carefully refrained from committing itself to this doctrine.[6] It would seem, however, to be the opinion of that Court that such a decision as that made in the principal case raised no question under the Constitution of the United States which may be taken advantage of on writ of error to the highest court of a State.

CONSTITUTIONALITY OF THE GRANDFATHER CLAUSES.—While Congress has plenary power to supervise the balloting for federal officers,[1] it is well settled that the right of suffrage is not one of the fundamental privileges or immunities,[2] and that it is competent for each State to prescribe the qualifications which must be attained by its citizens to entitle them to vote in national, as well as local, elections.[3] The Fifteenth Amendment places an inhibition upon this broad power of the States by forbidding the exclusion of any person from the exercise of the franchise "on account of race, color or previous condition of servitude."[4] The hostile attitude of many citizens and States toward the Amendment, however, has done much to render it nugatory. This opposition has finally led to the adoption in many States of constitutional provisions, whose admitted purpose is to disfranchise as many negroes as possible and yet retain the ballot for the whites.[5]

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[5]See 22 Harvard Law Rev. 182; 3 Illinois Law Rev. 195.

[6]Central Land Co. *v.* Laidley (1895) 159 U. S. 103. Mr. Justice Day, speaking for the Court in Patterson *v.* Colorado (1907) 205 U. S. 454, 461. "There is no constitutional right to have all general propositions of law once adopted remain unchanged. * * * It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

[1]*Ex parte* Seibold (1879) 100 U. S. 371.

[2]Minor *v.* Happersett (1874) 21 Wall. 162; United States *v.* Cruikshank (1875) 92 U. S. 542; Pope *v.* Williams (1904) 193 U. S. 621.

[3]Amendments to the Constitution of Connecticut, Art. XI, providing that no one shall be permitted to vote unless he can read and write a portion of the Constitution. Amendments to the Constitution of Massachusetts, Art. XX. As to state elections, this power seems properly to belong to the State, but the necessity and reason for depriving the Federal Government of the right to stipulate which of its citizens shall participate in national elections, is not so apparent.

[4]The Amendment operated to repeal the discriminatory clauses which were embodied in the various state constitutions. Neal *v.* Delaware (1880) 103 U. S. 370. An interesting argument has arisen as to the validity of the Amendment. See 23 Harvard Law Rev. 169; 10 Columbia Law Rev. 416.

[5]Constitution of Georgia, Art. II, § 1; Constitution of Mississippi, Art. XII, § 244; Constitution of North Carolina, Art. VI, § 4; Constitution of Louisiana, Art. CXCVII, § 5; Constitution of Oklahoma, Art. III. § 4 (a).